bution against the estate of the first deceased victim. In the premises, I have no doubt that the defendant has a right to do so. The objection of the plaintiffs is therefore dismissed and I, accordingly, allow the defendant to amend his statement of defence in the manner sought by him in his application. Costs of this proceeding are to be paid by the plaintiffs to the defendant in any event.

Application allowed.

Solicitors: *RK Nathan & Co; Azim, Ong & Krishnan.*

Reported by *Yap Shao Sin*

Public Prosecutor v Tee Kim Pong

HIGH COURT (ALOR SETAR) — CRIMINAL TRIAL NO 58-01-86
KC VOHRAH J
17 JANUARY 1990

Criminal Law — Dangerous drugs — Trafficking in — Presumption of trafficking — Rebutting presumption — Burden of proof — Dangerous Drugs Act 1952, s 39B(1)(a)

On 24 August 1985, at the Bukit Kayu Hitam Customs Complex, Kedah, the accused was found in possession of two boxes of oranges. Upon closer inspection, the customs officers discovered 12,722.90g of raw opium hidden in the bottom of the boxes and the accused was charged with trafficking in a dangerous drug under s 39B(1)(a) of the Dangerous Drugs Act 1952.

In his cautioned statement, the accused claimed that he was paid by someone in Hadyai to take the boxes to Johore Bahru where they would be picked up by someone who would meet him. He was told that the boxes contained oranges, and he had no knowledge of the raw opium.

Held, acquitting the accused:

(1) The cautioned statement had to be assessed as to whether it weakened or strengthened the prosecution's case. At the close of its case, the prosecution had established that the accused had custody of the boxes. Following the presumption in s 37(d) of the Act, from custody flows knowledge as to contents.

(2) The accused had, however, on a balance of probabilities rebutted this presumption. His explanation of how the boxes were entrusted to him and the fact that he was the one who brought the attention of the customs officers to the boxes and his subsequent assistance to the authorities were consistent with his innocence.

Cases referred to

1 *Lim Yow Choon* v *PP* [1972] 1 MLJ 205 (folld)
2 *Soo Heng Huat* v *PP* [1968] 1 MLJ 80 (folld)

Legislation referred to

Dangerous Drugs Act 1952, ss 39B(1)(a), (2), 37(da)(v)

Zamri bin Ismail (Deputy Public Prosecutor) for the Public Prosecutor.
Manjit Singh for the accused.

Cur Adv Vult

KC Vohrah J: When the trial ended yesterday, I acquitted and discharged the accused on a charge that he on 24 August 1985 at about 3.30pm at the Immigration Complex, Bukit Kayu Hitam, Kedah, trafficked in 12,722.90g of raw opium, a dangerous drug, in contravention of s 39B(1)(a) and punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('the Act'). I now give my written reasons for his acquittal.

The brief facts are these. A Malaysian tourist bus had arrived from Thailand at the customs check point for buses at the Immigration Complex, Bukit Kayu Hitam, Kedah, and a customs officer approached the bus for inspection for the passengers. She heard a voice from behind her telling her that there were things in the bus. The man who told her this was the accused and they both went to the left side of the bus where the accused opened the luggage compartment. The only things that were there were three boxes, two of which, on examination, were found to contain seven packages of a substance which a government chemist later found to be raw opium; the raw opium weighed 12,722.90g. When asked by a senior customs officer whether the 'things' belonged to him he said, 'Yes'. However, although he admitted to a senior customs officer and he also admitted in a cautioned statement that the two boxes belonged to him he denied knowing about the raw opium in the two boxes. His cautioned statement showed he had no such knowledge and I was satisfied after he had given his defence that his conduct at the customs check point was consistent with innocence and that on a balance of probabilities he was not aware that there was raw opium in the two boxes.

Customs officer Habsah (PW2) said that while she was on duty at 3.30pm on 24 August 1985 at the Bukit Kayu Hitam Immigration Complex at the inspection counter for passengers, she was instructed by another customs officer to check a Malaysian tourist bus (P9) which had arrived from Thailand.

In her evidence, Habsah said, 'While I was walking towards the bus, I heard a voice from behind telling me that things were in the bus'. She said she turned her head and she saw the accused. She then proceeded with him to the left side of the bus.

Customs officer Habsah said that the accused then opened the luggage compartment on the left side of the bus and she saw three boxes of different sizes in the compartment, the only things in the compartment. They were 'paper boxes' tied with raffia. She requested the accused to bring down and open the boxes which the accused did. And the accused first opened the smallest box (P5). There were oranges in the box and they were removed and Habsah saw at the bottom of this box a white package (P17E) wrapped with a plastic bag. Habsah said she used a pen to poke into the package and she found a blackish substance sticking to it.

She then instructed the accused to open another box (P6) which he did and she found oranges in the box. She said the accused assisted her in taking out the oranges from this box. And she found in this box five packages similar to the package she had discovered in the earlier box. Two packages (P17C and P17D) were in a yellow plastic bag. Another two packages (P19A2 and P19A3) were in a pink plastic bag. One package (P18A2) was found in another yellow plastic bag. And she also found a smaller package (P20A2) in a transparent plastic bag.

On her instructions, the third box (P7) was opened by the accused and it was found that it contained an aluminium steam pot.

Customs officer Habsah said that she then went up to the bus with the accused and another person, and the accused picked up a clothes bag (P8) after which she got down and took a sample from the package (P17E) which was found in the first box (P5) that was opened.

Customs officer Habsah subsequently went round to look for Superintendent of Customs Tuang and the accused followed her. On locating him, Habsah showed him the sample taken from package P17E and she then brought him to see the exhibits which had been left beside the bus. Superintendent Tuang (PW6) confirmed being brought to see the exhibits by Habsah. He also said he walked with the accused towards the place where the exhibits were and that he asked the accused whose things they were and that the accused replied that they were his and that the things were 'a type of rubber' and that 'he wanted to pay the taxes on the things'. Superintendent Tuang said that the accused could not explain what the things were and he also said, in answer to a question posed by the court, that he spoke to the accused in Bahasa Malaysia and the accused was not conversant with the language and he could not remember what the accused actually said when he said the things were his.

After Superintendent Tuang had examined the two boxes containing the seven packages, he and customs officer Habsah, assisted by the accused, then brought the three boxes and the clothes bag to Superintendent Tuang's office and later the accused was handed over to senior customs officer Mohd Yusof bin Hj Jaffar. The three boxes with their contents, an international passport and also a restricted passport, both belonging to the accused, and a bunch of bus keys were also handed over to officer Mohd Yusof, the investigating officer of the case. Officer Yusof examined the boxes, caused photographs (D13A to C) of the seven packages to be taken by PW4 and drew a sketch plan of the area of incident (P14).

Officer Yusof said that he packed the seven packages found in the two boxes, P5 and P6, and sent them to the chemist for analysis. The chemist report (P2) shows that all the seven packages contain 12,722.90g of raw opium. Raw opium is defined under s 2 of the Act and read with the First Schedule to the Act falls within the meaning of a 'dangerous drug' under s 2 thereof.

At the close of the case for the prosecution, the evidence showed that the accused had admitted to Superintendent Tuang that 'the things' belonged to him. It appeared that the 'things' referred to the raw opium which were found in the two boxes since the explanation given by the accused to Superintendent Tuang that the 'things' were a type of rubber could not have been a reference to the boxes but to the packages and the substance therein.

The admission that the things were his by the accused had however to be viewed in the context of a cautioned statement (D3) made by the accused. Customs officer Mohd Ghani, PW1, under cross-examination had stated that the accused had made the statement to him. The statement by the accused explained that the accused was paid by someone in Hadyai 200 Bhat to bring two boxes (ie P5 and P6) to Johore Bahru where they would be picked up by someone who would meet him. The accused was told that the boxes contained oranges. He said the third box, the box with the pot, was his.

In short, the two boxes had been entrusted in the care of the accused by someone in Hadyai. From that and his admission to Superintendent Tuang it cannot be gainsaid that he had custody of the two boxes where the seven packages of raw opium were found.

But from the cautioned statement, it did appear that he was told by the man in Hadyai that the contents were oranges. And it appeared from the circumstances adduced in evidence of the prosecution witnesses that though he had control and custody of the two boxes he did not have any knowledge that the goods in the boxes were raw opium. However his reference to the 'things' being 'rubber' as reported by Superintendent Tuang struck a discordant note in the otherwise fairly clear inference that could have been drawn that he had no knowledge that the contents were raw opium. How could he have stated to Superintendent Tuang that the things were 'rubber' and how could he have mentioned in his cautioned statement that he thought it was 'rubber which could be used for cars to prevent rust' unless he had seen the contents in the boxes? It was not clear if he knew of this before customs examination of the goods. And was he trying to feign ignorance of the nature of the black substance which was raw opium?

It will be noted that the cautioned statement did not form part of the case for the prosecution; its existence was made known through a prosecution witness under cross-examination and then it was tendered as a defence exhibit. It was obvious the prosecution did not wish to rely on it as forming part of the case for the prosecution. But it was in evidence and it could not have been ignored when the case

for the prosecution at the close of the prosecution's case was considered. The cautioned statement had to be assessed as to whether it weakened or strengthened the prosecution's case and to my mind the method of assessing the evidence of the prosecution which had been adduced vis-a-vis the cautioned statement is as explained in the case of *Lim Yow Choon* v *PP*[1] although in that case the cautioned statement formed part of the prosecution's case. While the cautioned statement weakened the prosecution's case as regards the question whether the accused had know-ledge that the boxes contained raw opium, I had to be mindful that presumptions under the Act had to be considered as well.

At the close of the prosecution's case, what was earlier established as previously stated was custody of the two boxes containing the raw opium. From custody of the containers flows knowledge as to the contents of the container being a dangerous drug as a matter of presumption under s 37(d). The presumption can however be rebutted from the prosecution evidence (see *Soo Seng Huat* v *PP*[2]). But in this case before defence was called it was not entirely clear if it could be said that the accused did not know that the contents of the boxes were raw opium. The accused had to rebut this presumption on a balance of probabilities by making his defence. And if he failed to rebut the presumption of knowledge he had, in making his defence, to rebut the presumption of trafficking raised under s 37(da)(v) since the weight of raw opium was well in excess of the presumptive amount.

The accused in his evidence stated that he was a bus driver and that before his arrest he used to drive tourists to Hadyai from Singapore and back about ten times a month. His tourist bus was under repair in Hadyai and he was going back to Malaysia on a bus. He said that a man he had known for some time (though he did not know his name) had given him two boxes to be sent to Johore Bahru telling him that they contained oranges. He had partly opened the flaps to the boxes to inspect what were inside and he saw that there were oranges inside. He said he had previously brought durians, oranges, mangoes and tomatoes for this man to be delivered to Johore Bahru and they had been cleared at the customs and he therefore trusted the man. He did not know the name of the person who was going to collect the boxes but he knew him personally.

He also explained what he meant when he called the substance in the packages as 'rubber'. He referred to two places in his cautioned statement where he had stated that he thought that the substance (in the packages) was rubber which could be used for vehicles for anti-rust purposes and that he used to go to vehicle workshops and had seen such a substance being used. In his evidence he said that he had visited vehicle repair workshops on several occasions to get the under carriage of his bus treated with an anti-rust substance. He said he only saw the blackish substance in the box after the two boxes had been opened (at the custom area) and after the oranges had been removed. He denied he wanted to mislead the customs by claiming the raw opium (which is black in colour) as a type of substance which could be used for anti-rust purposes.

In evaluating his evidence, I took into consideration the totality of the evidence including the evidence for the prosecution which showed that at the customs point at Bukit Kayu Hitam, it was the accused himself who brought the attention of a customs officer to the fact that he had things in the bus. He could have kept quiet about the boxes but he drew attention to them. It was he who brought the officer to the bus and opened the luggage compartment of the bus to show her the things, which were the three boxes. He himself brought all three boxes down and he himself opened all three boxes for inspection. There were oranges in two boxes and he assisted in taking out the oranges from one of the boxes. He stated that he was surprised to see the black substance — he thought it was 'rubber'— and it is clear that the customs officer who was there was also not sure what it was. The customs officer went looking for a senior officer — and the accused could have left the customs complex and disappeared after the discovery of the black substance as he had already cleared immigration but he did not — he followed the officer all over until Superintendent Tuang was contacted. And then he offered to pay tax.

To my mind his conduct throughout at the customs area was hardly that of a person who knew what was actually in the box; his conduct was consistent with innocence; he did not know that the two boxes contained raw opium. And the story he gave was believable. He was naive. He had foolishly trusted someone whom he knew in Hadyai and had been taken advantage of by that man. From earlier encounters with the man, he had been lulled into complacency when goods entrusted in his care by this man for transport into Malaysia had been consistently cleared by Malaysian customs. He took a peep at the boxes, saw oranges and was satisfied the boxes contained oranges.

On a balance of probabilities, he had rebutted the presumption that he had knowledge of the nature of the contents of the two boxes as being raw opium and therefore I acquitted and discharged him.

Accused acquitted.

Solicitors: *Manjit Singh & Co.*

Reported by *Mathavan Devadas*